

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD JAMES

Plaintiff,

v.

WENDY'S INTERNATIONAL, INC.,

Defendant.

No. C05-0021P

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment. (Dkt. No. 22). Having considered all relevant papers and pleadings and having heard oral argument on this matter, the Court GRANTS Defendant's motion for summary judgment as to Plaintiff's discrimination claims. The Court also dismisses Plaintiff's retaliation claims in light of Plaintiff's withdrawal of those claims at oral argument.

BACKGROUND

Plaintiff Donald James started working for Defendant Wendy's International, Inc. in 1989. Mr. James is African-American. Throughout the course of his employment, Mr. James received a number of wage increases, bonuses, and promotional opportunities. He served as shift manager, assistant manager, manager, and again assistant manager.

1 However, Mr. James' job performance at Wendy's was not all positive. He received
2 approximately twenty written disciplinary warnings (see EEOC Record of Interview Attached to the
3 Original Complaint), four of which were for cash violations in 2001-2003. On December 31, 2002,
4 he received a final written warning for a cash shortage of ninety dollars. Mr. James signed the
5 warnings acknowledging his mistakes. On November 6, 2003, Mr. James was terminated for a cash
6 shortage of forty-one dollars and other cash control violations. He was replaced by a female Hispanic
7 employee, Ms. Juanita Saunders.

8 According to Wendy's operations guidelines, every shift has a cash manager known as the
9 "Operations Leader" whose duties include cash control, food safety, customer satisfaction, and
10 safety. The Operations Leader ensures that cash handling procedures are strictly followed, which
11 includes hourly removing of monies from the registers and depositing of cash receipts in the bank.
12 The Operations Leader must also ensure that the time the money is removed from the cash register
13 and the amount removed is accurately recorded on cash control envelopes.

14 On November 6, 2003, Mr. James was the Operations Leader on the night shift at Wendy's
15 Rainier store. It is undisputed Mr. James failed to follow the company's financial procedures and a
16 cash shortage of forty-one dollars occurred. Mr. James argues that he was short-staffed and therefore
17 could not fully perform his duties as an Operations Leader. However, Mr. David Davenport (another
18 manager) was called in by Mr. James to alleviate the employee shortage at the store. Mr. James also
19 argues that the forty-one dollars may have been taken by the day Shift Supervisor Digna Noyola to
20 buy three pizzas for the restaurant crew. Wendy's investigated the claim that Ms. Noyola took the
21 money but found no corroboration.

22 Mr. James filed a grievance challenging his termination with the Equal Employment
23 Opportunity Commission ("EEOC"). The EEOC was unable to conclude that Wendy's had
24 discriminated against Mr. James, but issued a right-to-sue letter. Mr. James then filed a
25 discrimination and retaliation claim against Wendy's in this Court. He alleges that his termination
26 was racially motivated and in retaliation for his involvement in a discrimination action against

1 Wendy's by another employee. In 1999, Mr. James provided a statement on behalf of Charles Moss
 2 who had a complaint of racial discrimination against Wendy's. The case was resolved in 2000
 3 without Wendy's acknowledging any liability. During oral argument, Plaintiff's counsel withdrew
 4 Mr. James' retaliation claims against Wendy's. Therefore, the Court will only address Mr. James'
 5 remaining claims for race discrimination in this order.

6 Wendy's claims that Mr. James' discharge was not based on racial discrimination but on his
 7 failure to follow the company's financial policies, despite repeated written warnings. For those
 8 reasons, Wendy's has moved for summary judgment on the discrimination claim.

9 ANALYSIS

10 A. Legal Standard for Summary Judgment

11 Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and
 12 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
 13 material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.
 14 56(c). A "genuine issue" exists where the evidence before the court is of such a nature that a
 15 reasonable jury could return a verdict in favor of the non-moving party. A mere "scintilla" of
 16 evidence is not enough to defeat summary judgment. Instead, there must be evidence upon which a
 17 jury could reasonably find in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477
 18 U.S. 242, 248-52 (1986).

19 A fact is "material" if it hinges on the substantive law at issue and if it may affect the outcome
 20 of the case. Id. at 248. The moving party must first make a prima facie showing that summary
 21 judgment is appropriate under Rule 56. The moving party can meet its burden by pointing out the
 22 absence of evidence of a genuine issue of material fact. Musick v. Burke, 913 F.2d 1390, 1394 (9th
 23 Cir. 1990). When the moving party meets its burden, the burden then shifts to the non-moving party
 24 to show by affidavit or otherwise that a genuine issue of material fact exists. Matsushita Elec. Indus.
 25 Co. v. Zenith Radio Corp., 475 U.S. 574 586 (1986). The evidence of the non-moving party will be
 26 believed as true, all doubts will be resolved in favor of the non-moving party, and all reasonable

1 inferences will be drawn in the non-moving party's favor. Hunt v. Cromartie, 526 U.S. 541, 550-55
2 (1999).

3 **B. Racial Discrimination Claim**

4 Mr. James' claims of race discrimination arise under Title VII of the Civil Rights Act
5 of 1964. Title VII prohibits employers from discriminating against any individual with
6 respect to race. 42 U.S.C. § 2000e-2(a) (1) (2005). The proper legal framework for
7 determining whether Mr. James' claim should survive summary judgment is based on the
8 burden-shifting mechanism set out in McDonnell Douglas Corp. v. Green, 411 U.S.792, 802
9 (1973). Under McDonnell Douglas, Mr. James must first establish a prima facie case of
10 racial discrimination. Id. at 802. He may make a prima facie case by showing (1) he belongs
11 to a protected class, (2) he performed his job satisfactorily, (3) he was subjected to an
12 adverse employment action, and (4) similarly situated employees who were not African-
13 American were treated more favorably. Cornwell v. Electra Cent. Credit Union, 439 F.3d
14 1018,1028 (9th Cir. 2006). See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506
15 (1993).

16 If Mr. James succeeds in establishing a prima facie case, the burden of production
17 shifts to Wendy's to articulate a legitimate, nondiscriminatory reason for terminating Mr.
18 James' employment. McDonnell Douglas, 411 U.S. at 802. If Wendy's does so, Mr. James
19 must demonstrate that Wendy's articulated reason is a pretext for unlawful discrimination by
20 "either directly persuading the court that a discriminatory reason more likely motivated the
21 employer by showing that the employer's proffered explanation is unworthy of credence."
22 Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000). Mr. James' evidence
23 must be both specific and substantial to overcome the legitimate reasons put forth by
24 Wendy's. Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1038 (9th Cir. 2005).

1 **1. Protected Class**

2 It is undisputed that Mr. James belongs to a protected class because he is an African-
3 American. Title VII applies to any racial group. Griggs v. Duke Power Company, 401 U.S.
4 424, 434 (1971).

5 **2. Job Performance**

6 Direct evidence presented by Wendy's indicates that Mr. James' job performance was
7 not satisfactory. Mr. James received approximately twenty disciplinary written notices, four
8 of which were cash violations prior to his termination. (See EEOC Record of Interview
9 Attached to the Original Complaint and Gaviria Decl., Ex.7). According to Wendy's Policy
10 Bulletin and Cash Control Policy, any violation of cash control policies is subject to a
11 disciplinary action. (See Pacheco Decl., Ex. 2 and 3). Mr. James was aware of the policy
12 because he signed a document acknowledging that he had read it.

13 It is undisputed that Mr. James violated his responsibility as a cash manager repeatedly
14 prior to his termination and that he received written warnings for these violations. Two times
15 he failed to deposit cash receipts in the bank in timely manner and on the third time, there was
16 a cash shortage of ninety dollars. (See Pacheco Decl., Ex. 4, 5 and 7). Wendy's discipline
17 policy generally requires only two written warnings before termination, but Mr. James was
18 given a third chance to correct his mistakes. When Mr. James violated cash control policies
19 the fourth time, he was terminated. Mr. James suggests that the written warnings were
20 racially motivated. However, the evidence indicates that from November 10, 2000 through
21 November 11, 2003, eight Caucasians were issued disciplinary notices related to cash handling
22 vis-a-vis two African-Americans. (Dkt. No. 33).

23 Mr. James also questions his written warnings because they were issued after he
24 provided a statement against Wendy's in a discrimination claim. However, Mr. James had
25 previous write-ups before he provided that statement. Additionally, he never challenged the
26 written warnings, but instead signed them in acknowledgment of his mistakes. Furthermore,

1 similar warnings were issued to other employees who were not involved in the protected
2 action.

3 **3. Adverse Action**

4 It is undisputed that Mr. James was subjected to an adverse action when he was
5 terminated.

6 **4. More Favorable Treatment**

7 Mr. James must present evidence to show that similarly-situated employees who were
8 not African-American were treated more favorably than him. In the instant case, Mr. James
9 may meet this burden by showing that non-African American employees who have committed
10 similar violations were treated differently. Leong v. Potter, 347 F.3d 1117, 1124 (9th Cir.
11 2003)

12 Mr. James claims that the forty-one dollar shortage that led to his termination was
13 taken by Ms. Noyola and that she was treated more favorably than him because she was not
14 disciplined. (See Plaintiff's Response at 5). He claims that Ms. Noyola took approximately
15 forty dollars from the register to buy pizza. This claim is apparently based on what Mr. James
16 was told by another manager, Ms. Clara Fay. Ms. Fay informed Mr. James that "she had
17 stopped by the store earlier, that she had witnessed – she don't know [sic] if Digna used her
18 money, but she [had] seen [pizza] at the register. . . ." (James' Dep. at 148). Wendy's carried
19 out an investigation about the alleged incident and concluded that the claim was unjustified.
20 Mr. James has failed to present any evidence to contradict the outcome of Wendy's
21 investigation. His claim is based on conclusory averments, speculation, and unfounded self-
22 serving statements which cannot be used to defeat a summary judgment motion. In re Sunset
23 Bay Assoc., 944 F.2d 1503 1513 (9th Cir. 1991); Delange v. Dutra Const. Co., 183 F.3d 916
24 (9th Cir. 1999); In re Kaypro, 218 F.3d 1070, 1075 (9th Cir. 2000).

25 Furthermore, Mr. James argues that the violation of the cash policy would not have
26 occurred had he been provided with enough staff to run the store. He suggests that short

1 staffing was a “set up” for his failure. (See James’ Dep. at 199). However, Mr. James does
2 not provide any evidence, direct, or otherwise, to show that his shifts were always short
3 staffed in contrast with other managers. Instead, the facts indicate that shortage of staff was
4 brought about by other factors. For example, on November 6, 2003, one of the managers
5 (Mr. Paul LeBeau) was on vacation, and a week before the incident, another employee quit.
6 By Mr. James’ admission, if “Paul was not on vacation this would not have happened.” Id.
7 The fact that Mr. James’ shift was short-staffed because an employee was on a scheduled
8 vacation and another had quit does not raise an inference of racial discrimination.

9 In addition, Mr. James contends that one of the managers on duty that night, Mr.
10 David Davenport, was treated more favorably because he was not disciplined for the same
11 incident that led to Mr. James’ termination. However, Mr. Davenport was not the Operations
12 Leader on the shift and was not responsible for cash control. Mr. James also suggests that
13 Mr. Davenport was responsible for inadequate staffing on November 6, 2003 and should have
14 been disciplined for that reason. However, Mr. James does not provide any evidence to show
15 that Mr. Davenport was the one responsible to fill the vacancy created as a result of another
16 employee quitting. Furthermore, there is no evidence that Mr. Davenport violated cash
17 control policies even once, let alone four times.

18 Therefore, the Court finds that Plaintiff has not made a prima facie case that similarly
19 situated non-African Americans employees were treated more favorably than him.

20 **5. Pretext**

21 Because Mr. James has failed to establish a prima facie case for summary judgment
22 purposes, he does not benefit from the presumption of impermissible discrimination. Lyons v.
23 England, 307 F.3d 1092, 1112 (9th Cir. 2002). Even if Mr. James had established a prima
24 facie case of discrimination, Wendy’s has articulated a legitimate non-discriminatory reason
25 for his terminations, namely his repeated violations of Wendy’s cash control policies following
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1 written warnings. Wallis v. J.R.Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Mr. James has
2 not offered evidence suggesting that this reason for his termination is pretextual.

3 CONCLUSION

4 As discussed above, Mr. James has not presented evidence sufficient to make a prima
5 facie case of discrimination. Therefore, the Court GRANTS Defendant's motion for summary
6 judgment with respect to Plaintiff's claims for race discrimination. Plaintiff's retaliation claims
7 will also be dismissed in light of Plaintiff's withdrawal of those claims at oral argument.

8 The clerk is directed to send copies of this order to all counsel of record.

9 Dated: May 16, 2006.

10 s/Marsha J. Pechman
11 Marsha J. Pechman
12 United States District Judge
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